



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application of the Town of Sheboygan and Town
of Sheboygan Sanitary Districts #2 and #3 for a
Permit for Grading and Utility Installation on the
Bed of the Pigeon River, Town of Sheboygan,
Sheboygan County

Case Nos. 3-SE-01-0958SH
& 3-SE-01-0959SH

**FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER APPROVING
WATER QUALITY CERTIFICATION AND GRADING PERMIT**

The Town of Sheboygan and the Town of Sheboygan Sanitary Districts #2 and #3 (the Applicants) applied to the Department of Natural Resources for a permit to grade in excess of 10,000 square feet on the bank of the Pigeon River and for water quality certification. The Applicants are planning an extension of existing sanitary sewer and water main systems. The proposed grading and water quality certification are required for construction of a segment of the extension that crosses the Pigeon River between Woodland Road and Hawthorn Road in the Town of Sheboygan.

The Department of Natural Resources issued a Notice of Proposed Grading which stated that unless written objection was made within 30 days of publication of the Notice, the Department may issue a decision without a hearing. Timely objections were received. On April 3, 2002, the Department filed a Request for Hearing with the Division of Hearings and Appeals. Pursuant to due notice, a hearing was held in Sheboygan, Wisconsin on April 25, 2002, before Mark J. Kaiser, Administrative Law Judge. The parties filed written argument after the hearing. The last brief was received on May 8, 2002.

In accordance with Wis. Stat. § 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Town of Sheboygan and the Town of Sheboygan Sanitary District Nos. 2 and 3, by

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Wisconsin Department of Natural Resources, by

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FINDINGS OF FACT

1. The Town of Sheboygan and the Town of Sheboygan Sanitary Districts Nos. 2 and 3 (the Applicants), 3932 Superior Avenue, Sheboygan, Wisconsin, 53081, completed filing an application with the Department of Natural Resources (the Department) for a permit under Wis. Stat. § 30.19 to grade in excess of 10,000 square feet along the banks of the Pigeon River in Sheboygan County (Exh. 5). The proposed project is located in the NW ¼, NE ¼, Section 18, and the SW ¼, SE ¼, Section 7, Township 15 North, Range 23, Town of Sheboygan, Sheboygan County.

2. The application seeks a permit to grade more than 10,000 square feet along the banks of the Pigeon River, which is navigable in fact at the project site. The proposed project involves the extension of existing sewer and water mains from Woodland Road to Hawthorn Road. The proposed route of the extensions runs approximately 400 feet in an easterly direction from Woodland Road along the north property line of property owned by Jeffery and Dawn Saak. The proposed extension then runs approximately 550 feet in a northerly direction through property owned by Natalie Fraser Perry, Timothy and Carol Janssen, and Ronald Sandven and Cynthia Joa. This segment of the project also includes a crossing of the Pigeon River. At the north property line of the Sandven/Joa property the extensions continue in a northeasterly direction for approximately 350 feet to Hawthorn Road. This segment of the extensions crosses property owned by Arthur Koeser, Jr.

3. The original proposal included an open trench crossing of Pigeon River. After the Applicants awarded the contract for the project to a contractor, the contractor proposed to construct the segment of the project including the Pigeon River crossing by directional boring. Directional boring will eliminate the need for any grading along the west bank of the Pigeon River and will reduce the amount of grading necessary along the east bank of the Pigeon River.

4. While investigating the application, Department staff determined that the area east of the Pigeon River was an unmapped wetland. The wetland affected is approximately twenty acres in size. The Applicants were directed to perform an alternative analysis for water quality certification pursuant to Wis. Admin. Code ch. NR 103. The Applicants filed an application for water quality certification (Exh. 11). Alternative routes considered for the sewer and water main extensions that would connect the existing mains from Woodland Road and Hawthorn Road would also impact the same wetlands.

5. Another proposed alternative, looping the water mains in existing streets, would avoid construction through the subject wetlands altogether. However, this proposal would significantly increase the total cost of the sewer and water main extension project and would not achieve two of the stated goals of the project, looping of the water main at approximately one mile intervals and a sewer main at an elevation of 645.0 feet on the Saak property. This elevation and location is necessary for the sewer to serve future subdivisions east of Woodland Road and west of the Pigeon River.

6. The proposed project, sewer and water main extensions, is not a wetland dependent activity. However, no practical alternatives to construction of the mains through the wetlands exist. Construction of the sewer and water main in compliance with the conditions set forth below will avoid any long-term negative impacts on the wetlands.

7. The objectors' primary concern about the impacts of the proposed project is not with impacts of the functional values of the wetlands but with the number of mature trees which will be removed during the construction process. Removal of mature trees is undesirable; however, the Department does not consider the loss of mature trees a long-term negative impact. Moreover, the proposed route has been adjusted, to the extent possible, to minimize the loss of mature trees.

8. The proposed project will not materially obstruct navigation and will not be detrimental to other public interests if constructed in accordance with this permit.

9. The proposed project, if constructed in accordance with this permit, will not adversely affect water quality, will not increase water pollution in surface waters, and will not cause environmental pollution as defined in Wis. Stat. § 299.01(4).

10. The proposed project conforms with the standards of Wis. Admin. Code chs. NR 103, 115, 116, 117 and 299.

11. The Department has determined that granting the grading permit does not constitute a major state action significantly affecting the quality of the human environment.

12. The Department and the Applicants have completed all procedural requirements and the project as permitted will comply with all applicable requirements of Wis. Stat. §§ 1.11 and 30.19(1)(c) and Wis. Admin. Code chs. NR 102, 103, 115, 116, 117, 150 and 299.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification and grading permit cases pursuant to Wis. Stat. §§ 227.43(1)(b) and 30.19, and Wis. Admin. Code § NR 299.05(6).

2. The proposed construction of sewer and water main extensions is not a wetland dependent activity within the meaning of Wis. Admin. Code § NR 103.07(3) because said construction is not of a nature that requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose.

3. No practical alternatives to the proposal exist which would not adversely impact wetlands and will not result in other significant environmental consequences. Practical alternatives means available and capable of being implemented taking into consideration cost, available technology and logistics in light of overall project purposes. Wis. Admin. Code § NR 103.07(2).

4. The Applicants have shown that the proposed project will not result in significant adverse impacts to the functional values of the affected wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences. There will be no “significant detrimental impacts” to the functional values of the subject wetlands. A clear preponderance of the evidence indicates that there will be no significant detrimental impacts to water quality protection, wildlife habitat, or floodwater storage if the water quality certification is granted.

5. The Division of Hearings and Appeals has the authority pursuant to Wis. Admin. Code § NR 299.05, to deny, approve or modify a water quality certification if it determines that there is a reasonable assurance that the project will comply with standards enumerated in Wis. Admin. Code § NR 299.04. The Division is satisfied that there is a reasonable assurance that the project will comply with said standards, based upon the evidence presented at the hearing.

6. Unless a permit has been granted by the Department of Natural Resources, it is unlawful “[t]o grade or otherwise remove top soil from the bank of any navigable stream, lake or other body of navigable water where the area exposed by such grading or removal will exceed 10,000 square feet.” Wis. Stat. § 30.19(1)(c).

7 The Applicants have carried their burden of proof in demonstrating that the project will not injure public rights or interests, including fish and game habitat, that the project will not cause environmental pollution as defined at Wis. Stat. § 299.01(4), and that no material injury to the rights of any riparian owners on any body of water affected. Wis. Stat. § 30.19(4) The conditions in the permit set forth below are reasonable and necessary to protect the public interest.

8. Water quality certification is a type IV action under Wis. Admin. Code § NR 150.03(8)(f)18. Type IV actions do not require the preparation of a formal environmental impact assessment.

9. The proposed grading is a type II action under Wis. Admin. Code § NR 150.03(8)(f)2.b. Type II actions do not require the preparation of a formal environmental impact assessment unless the Department “determines that the proposal is a major action significantly affecting the quality of the human environment.” Wis. Admin. Code § NR 150.20(1)(c).

ORDER and PERMIT

WHEREFORE IT IS HEREBY ORDERED, in accordance with the foregoing Findings of Fact and Conclusions of Law, that water quality certification is granted. The Applicants are also hereby granted under Wis. Stat. § 30.19(1)(c) a permit to grade in excess of 10,000 square feet on the bank of the Pigeon River for the purpose of constructing a sewer and water main in an adjacent wetland in the Town of Sheboygan, Sheboygan County, also described as the NW ¼ NE ¼ S7, T15N, R23. The water quality certification and permit are granted subject to the following conditions:

1. A series of photographs clearly showing all areas covered by the permit shall be submitted to the Department within one week of completion of work on the site. The photographs shall be taken from different vantagepoints on the sites. Failure to properly submit the photographs would be a violation of permit conditions.
2. You, your agent, and any involved contractors shall be jointly and severally liable for any violations of Wis. Stat. § ch. 30 or this permit.
3. You shall notify Kathi Kramasz at (920) 892-8756 before starting construction and again not more than 5 days after the project is complete.
4. You shall complete the project as described on or before January 1, 2003. You may not begin or continue construction after this date unless the Department grants a new permit or permit extension in writing.

5. This permit does not authorize any work other than what you specifically describe in your application and plans, and as modified by the conditions of this permit. If you wish to alter the project or permit conditions, you shall first obtain written approval of the Department.
6. The project has been reviewed for compliance with Wis. Admin. Code ch. NR 103. The Department has determined that there is not a practicable alternative and no significant adverse impacts to the functional values of the affected wetland will occur.
7. You are responsible for obtaining any permit or approval that may be required for your project by local zoning ordinances or by the U.S. Army Corps of Engineers before starting your project.
8. You shall allow free and unlimited access to your project site at any time to any Department employee who is investigating the project's construction, operation, or maintenance.
9. The Department may modify or revoke this permit if the project is not completed according to the terms of the permit, or if the Department determines the activity is detrimental to the public interest.
10. You shall keep a copy of this permit and an approved plan at the project site at all times until the project is complete.
11. Your acceptance of this permit and efforts to begin work on this project signify that you have read, understood and agreed to follow all conditions of this permit.
12. Tree removal in the wetland must be minimal and shall not be greater than a 40' wide corridor. If the corridor will deviate from the flagged location of the easement, you must notify the DNR prior to beginning work so that we can review the new location and issue a written amendment.
13. Upon completion of the work in the wetland the area should be seeded with a wet meadow seed mixture such as DOT wetland seed mix #60. The Department will observe the site for the next 3 growing seasons and if native trees do not come into the disturbed area, seedling planting may be required.

14. A clay barrier must be placed around the pipes at the eastern edge of the wetland and at the location where the directional bore begins, as well as one every 200' along the pipeline through the wetland. The collars must be constructed so that the pipe bedding does not facilitate drainage of the wetland and should be adequate in size to block horizontal flow through the gravel.
15. You must flag the area of tree removal and the area where the directional bore will start on both sides of the river crossing. The Department agrees to inspect the area within 5 working days (barring unforeseen circumstances) and will call or write to verify that construction in these areas can begin.
16. In order to foster communication and cooperation with neighboring landowners, you must notify those affected properties 72 hours in advance of entering the property, unless exigent circumstances exist. In case of an emergency, reasonable measures must be taken to contact the neighbors prior to entering the property. Also, the final construction corridor/easement area should be flagged and property owners and DNR notified before work begins.
17. You must keep a weekly log on progress and notify the Department when the sewer and water line is laid through the wetland on the east, again when the directional bore will be constructed and when it is completed, and once more when the westerly portion of the project is done.
18. All areas must be restored to original grade upon completion of that portion of the work. Topsoil must be stockpiled and replaced over the top of the trench and excess material leveled or removed from site. In the wetland areas, all excess material must be removed to an appropriate upland area and stabilized. Temporary topsoil stockpiles cannot remain in the wetland longer than 7 days.
19. Any temporary stockpiles in the upland area that will remain in place for longer than 7 days must be protected with silt fence.
20. No work can occur in the wetland areas during the spring rainy period or between March 1st and May 1st. The Department may change these dates if we get an early thaw or rain in February.
21. No grading, tree cutting, or excavating shall be done within fifty feet of the Pigeon River. The segment of the project that crosses the Pigeon River shall be constructed using directional boring. The directional boring shall commence at least fifty feet from the southwest bank of the Pigeon River and extend to at least fifty feet east of the northeast bank of the

Pigeon River. The Applicants have agreed to investigate the feasibility of extending the directional boring on the northeast bank of the Pigeon River. Prior to commencing the project, the Applicants shall provide a report to the Department concerning whether additional directional boring is feasible. If the Department determines additional directional boring would further minimize the negative impacts to the wetlands and is economically and logistically feasible, the Applicants shall extend the segment of the project constructed by directional boring as directed by the Department.

22. Proper erosion control measures, including the use of silt fencing and staked hay bales, must be used and maintained during and after construction. All erodible areas must be immediately seeded and become stabilized with a fast growing grass seed mixture. These erosion control measures must adequately protect the waterway and wetlands from erosion and run-off.
23. If plans change and the crossings will be done via open trench methods or vibratory plow, proper permits must be obtained prior to doing the crossings. Additional permits would require a new application, detailed plans, and an additional fee.
24. You must ensure that this project does not result in the discharge of material such as betonite or boring slurry to any wetlands or waterway. You must adequately monitor the wetland or waterway that you are boring under to determine if a discharge is occurring. If a discharge does occur, you must immediately cease operation of the project. You must then contact the local DNR Water Management Specialist immediately. The appropriate steps must be taken to prevent any further discharge prior to the commencement of any further boring.
25. You will be responsible for the clean up and restoration of the wetland or waterway that you discharged material into. A plan must be developed and submitted to this Department within 7 days of the discharge for approval to clean up and restore this site. This plan must detail how the clean up will be performed and the time frame that it will occur within. All necessary Chapter 30 permits must be obtained for activities associated with the clean up process. Upon approval of the plan, you must restore the waterway and wetland to the satisfaction of this Department.
26. The intentional discharge of material such as bentonite or a directional bore slurry into a waterway or wetland is a violation of the State laws that regulate the discharge of deleterious materials into waterways or the filling of wetlands. As a result of an intentional discharge, the DNR may initiate an enforcement action. This action may include a monetary penalty and Court ordered restoration of the resource.

27. In the case of the directional bore breaking through the surface of the riverbed and causing a discharge of silt and/or slurry materials, work must stop immediately and the DNR must be called. You must have an emergency plan to protect the downstream areas from sedimentation and will need written approval before completing the river crossing.
28. The removal of vegetative cover and exposure of bare ground shall be restricted to the minimum amount necessary for construction. Areas where soil is exposed shall be protected from erosion by seeding and mulching, sodding, diversion of surface run-off, installation of straw bales or silt screens, construction of settling basins, or similar methods as soon as possible after removal of the original ground cover and no later than when construction is completed.
29. Any disturbed area that is to be left alone for more than 7 days, except between January 1 and February 15 must be seeded and mulched. A silt fence must be in place and maintained along the downslope edge of any disturbed areas within 200' of the river so that if we get a sudden rain the run-off is contained.
30. You must inspect the erosion control measures weekly and after every ½" or greater rain. Failures should be noted in the weekly log. Any failure that results in sedimentation into the wetland beyond the construction corridor or into the river shall be immediately reported to the DNR.
31. Construction shall be staged so that no more than 5,000 square feet of area is graded and not seeded and mulched at any one time. Protective measures shall be installed in the preceding stage before work begins on the next stage.
32. Prior to any rain event, or if the site is to remain unoccupied for longer than 24 hours, appropriate temporary measures such as straw beds and silt fences shall be put in place.
33. Erosion control measures such as silt fence, seeding and mulching and straw bales shall meet or exceed the standards in the Wisconsin Construction Site Best Management Practices Handbook.
34. Construction is allowed to start at this site once all issues are resolved with the neighbors and Sheboygan County regarding setbacks from the septic drain field and easements. Directional bore can be done during the winter months but if construction in the wetland is done before spring, the disturbed areas must be hydroseeded with a tackifier solution. The seed mix should include a wet meadow mix and a winter wheat or annual rye seed.

35. No disturbance, including operation of vehicles, vegetation removal, etc. is allowed within 50' of the top of the west bank of the river.
36. If any dewatering is needed and the discharge will be into a wetland or waterway, you must provide a written filtration plan to include dirt bags, sediment traps, etc so that the discharge is clean. Any discharge must meet the WPDES standards.
37. No work shall occur within the bed of the river itself. No riprap is to be placed along the banks.

Dated at Madison, Wisconsin on June 7, 2002.

STATE OF WISCONSIN
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By: _____
Mark J. Kaiser
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53 to insure strict compliance with all its requirements.